Supreme Court, U.S.
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No. 97-888

In the Supreme Court of the United States

OCTOBER TERM, 1997

MISSOURI, ET AL., PETITIONERS

v.

MICHAEL C. LIDDELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion to suspend the recruitment and entry of new students into the Voluntary Interdistrict Transfer Program for the 1997-1998 school year.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Brockington v. *Rhodes*, 396 U.S. 41 (1969)	11
Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977)	8, 9
DeFunis v. *Odegaard*, 416 U.S. 312 (1974)	11
Missouri v. *Jenkins*, 515 U.S. 70 (1995)	3, 7
Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911)	11
Williams v. *First Nat'l Bank*, 216 U.S. 582 (1910)	9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 126 F.3d 1049.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1997. The petition for a writ of certiorari was filed on November 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, suit was filed against the Board of Education of the City of St. Louis, alleging racial segregation in the city's schools in violation of the Fourteenth Amendment. Pet. App. 5a. The United States intervened as a plaintiff and the State of

Missouri (petitioner) was joined as a defendant. *Ibid.* After a trial, the district court found no constitutional violation. *Ibid.* Finding that petitioner and the City were jointly liable for creating and maintaining a segregated school system, the court of appeals reversed and remanded for the implementation of a remedy. *Ibid.*

On remand, the district court ordered the implementation of a mandatory desegregation plan within the city schools with funding to be shared equally by the City Board and petitioner. Pet. App. 5a. The district court also ordered petitioner, the United States, and the St. Louis Board of Education:

> To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that interdistrict pupil transfers will not impair the desegregation of the St. Louis school district ordered herein. * * *

Id at 6a. The court of appeals affirmed. *Ibid.*

2. In 1981, the district court added the St. Louis County school districts and County officials as defendants. Pet. App. 7a. The district court scheduled a hearing on interdistrict liability. *Ibid.* Before that hearing was held, the City Board, the Liddell and Caldwell respondents, and all of the County school districts entered into a settlement agreement. *Ibid.* The agreement provided for voluntary interdistrict transfers between city and county schools, and included fiscal incentives to encourage those transfers. *Ibid.* The district court approved the voluntary inter-

district transfer program (VITP). *Id.* at 7a-8a. Petitioner, as the "primary constitutional violator," was ordered to fund the VITP. *Id.* at 8a. The court of appeals affirmed the remedy. *Ibid.*

3. Petitioner subsequently filed three different motions for unitary status. Pet. App. 9a. A hearing on the third motion was scheduled for March 1996. *Id.* at 10a. Two months before the scheduled hearing, petitioner filed a motion to terminate the VITP on the basis of this Court's decision in *Missouri* v. *Jenkins* (*Jenkins III*), 515 U.S. 70 (1995). Pet. App. 10a. Petitioner described its motion as "conditional" because it wanted the court to decide the motion only if the court did not enter a finding of unitary status. *Ibid.* The district court denied petitioner's conditional motion as premature. *Ibid.*

In March 1996, the district court conducted a three-week unitary status hearing. Pet. App. 11a. Following the hearing, the district court appointed Dr. William H. Danforth, former Chancellor of Washington University of St. Louis, as a settlement coordinator. *Ibid.* The district court gave Dr. Danforth broad powers to further negotiations and directed the parties and their counsel to attend settlement meetings and to participate in the negotiations in good faith. *Ibid.* The court also ordered that "all components of the settlement agreement now in force shall continue as they are currently operating." *Ibid.* The court subsequently ordered that settlement negotiations should be kept confidential. *Ibid.* The court refused to set a time limit for the parties to conclude negotiations, stating that it was confident that the settlement coordinator would proceed expeditiously. *Ibid.*

Petitioner appealed the orders referring the case to the settlement coordinator, and sought a stay of the

transfer order pending appeal. Pet. App. 11a. The district court, the court of appeals, and Justice Thomas denied petitioner's motions for a stay pending appeal. *Ibid.* The court of appeals then dismissed petitioner's appeal for lack of jurisdiction. *Id.* at 11a-12a.

4. a. In March 1997, petitioner filed the motion at issue here. Pet. App. 12a. That motion sought an end to all efforts to recruit and admit new students into the VITP for the 1997-1998 school year and to relieve petitioner from any funding obligation with respect to those students. *Id.* at 3a-4a, 12a-13a. In support of that motion, petitioner argued that the order requiring funding of the VITP violates *Jenkins III*. *Id.* at 12a. The remaining parties opposed the motion, arguing, *inter alia*, that the settlement process should be permitted to run its course and that it was too late to end new transfers to the VITP for the 1997-1998 school year without causing significant disruption to parents, students, and staff. *Id.* at 12a n.6. The district court denied the motion "[f]or the reasons set forth in [the opposing parties'] responses." *Id.* at 23a. Petitioner's motion for a stay was denied by the district court, the court of appeals, the en banc court, and Justice Thomas.

b. The court of appeals affirmed. Pet. App. 1a-22a. The court held that, "[g]iven the long history of state-mandated, segregated schools, the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education, the district court did not abuse its discretion in denying [petitioner's] motion to phase out the voluntary transfer of black city students to county districts pending settlement negotiations." *Id.* at 4a. The court "encourage[d] the parties to proceed

diligently with their negotiations," and it concluded "that the settlement coordinator should be permitted to complete this important assignment." *Ibid.* The court made clear that, if the settlement discussions were to reach an impasse, the district court should promptly decide petitioner's motion to have the St. Louis City School District declared unitary. *Id.* at 16a.

The court rejected petitioner's contention that *Jenkins III* removed the district court's discretion to permit the enrollment of new students into the interdistrict transfer program pending the outcome of settlement discussions. Pet. App. 19a-21a. The court explained that "[a] premise of *Jenkins III* was that the trial court specifically found that no interdistrict violation had taken place," while "[n]o such determination has been made here." *Id.* at 19a. The court further noted that "the plaintiffs asserted interdistrict violations," and "[r]ather than contest these allegations, the County Districts entered into a settlement agreement." *Ibid.* The court refused to "make an initial determination with respect to an interdistrict violation," because "[m]aking such a determination would invade the province of the district court and would be unfair to the parties by denying them the opportunity, should it become necessary, to litigate the interdistrict violation issue." *Ibid.* The court therefore "affirm[ed] the order of the district court denying [petitioner's] motion to end all efforts to recruit and admit new students into the VITP for the 1997-98 school year." *Id.* at 21a.

ARGUMENT

Petitioner contends (Pet. 28) that review is warranted in this case because the court below "definitively held that, despite *Jenkins III*, the interdistrict remedies imposed on the State are a valid means of redressing the State's adjudged intradistrict violation." Petitioner, however, has mischaracterized the court of appeals' holding. The court's limited and unexceptional holding was that, given the pending settlement discussions, and the existence of unresolved allegations of an interdistrict violation, the district court did not abuse its discretion in denying petitioner's motion to prevent new students from entering the VITP for the 1997-1998 school year. That holding is correct and does not raise any issue of general importance. In any event, because the students at issue have now been admitted into the VITP, and the school year is more than half over, petitioner's request for relief is moot. Review by this Court is therefore not warranted.

1. The court of appeals articulated its narrow holding as follows: "Given the long history of state-mandated, segregated schools, the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education, the district court did not abuse its discretion in denying [petitioner's] motion to phase out the voluntary transfer of black city students to county districts *pending settlement negotiations*." Pet. App. 4a (emphasis added). The court "encourage[d] the parties to proceed diligently with their negotiations," and concluded that "the settlement coordinator should be permitted to complete this important assignment."

Ibid. The court also carefully explained why *Jenkins III* did not preclude the district court from leaving the VITP in place pending the outcome of settlement discussions. In particular, the court emphasized that "the plaintiffs [had] asserted interdistrict violations" and the district court had made no "determination" with respect to those allegations. *Id.* at 19a. The court rejected the invitation to resolve that issue itself, on the ground that "[m]aking such a determination would invade the province of the district court and would be unfair to the parties by denying them the opportunity, should it become necessary, to litigate the interdistrict violation issue." *Ibid.*

Thus, the court of appeals grounded its affirmance of the district court's order permitting the enrollment of new students in the VITP for an additional school year on two salient factors: the pendency of ongoing settlement discussions and the existence of unresolved allegations of *inter*district violations. Contrary to petitioner's contention (Pet. 28), the court did not hold that the VITP is an appropriate remedy for an *intra*district violation.

Given the narrow basis of the court of appeals' decision, petitioner errs in contending (Pet. 12) that the decision below conflicts with *Jenkins III*. In *Jenkins III*, this Court held that "a district court seeking to remedy an *intra*district violation that has not 'directly caused' significant interdistrict effects, exceeds its remedial authority if it orders a remedy with an interdistrict purpose." 515 U.S. at 97 (citation omitted). *Jenkins III* did not purport to address the very different question presented in this case—whether a district court may leave an existing remedy having an interdistrict component in place for one additional school year, when there are ongoing settle-

ment discussions concerning that remedy and when there are untried allegations of an interdistrict violation that could justify the remedy. There is therefore no conflict between *Jenkins III* and the decision below.*

2. The court of appeals' limited holding in this case does not warrant review by this Court. The question whether the district court abused its discretion in refusing to suspend the VITP for the 1997-1998 school year in light of pending settlement negotiations and untried allegations of interdistrict violations is fact-bound and does not raise any issue of general importance.

In any event, the court of appeals correctly resolved that narrow issue. *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977), is instructive on that point. In *Dayton*, the Court held that the court of appeals had erred in imposing a systemwide desegregation plan based on findings of three isolated constitutional violations. *Id.* at 417. The Court reversed and remanded to the district court for supplemental findings of fact and, if necessary, the taking of additional evidence. *Id.* at 419. Significantly, the Court ordered that the systemwide desegregation plan should re-

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* The court below suggested that it is an "open" question whether *Jenkins III* necessarily forecloses an argument that the VITP is an appropriate remedy for the violation found in this case. Pet. App. 20a-21a. That discussion of *Jenkins III*, however, was not essential to the court's judgment, and, in any event, does not remotely support petitioner's assertion (Pet. 28) that the court below "definitively held that, despite *Jenkins III*, the interdistrict remedies imposed on the State are a valid means of redressing the State's adjudged intradistrict violation."

main in place pending the outcome of the proceedings on remand. *Id.* at 421. The Court explained:

> While we have found that the plan implicitly, if not explicitly, imposed by the Court of Appeals was erroneous on the present state of the record, it is undisputed that it has been in effect in the Dayton school system during the present year without creating serious problems. While a school board and a school constituency which attempt to comply with a plan to the best of their ability should not be penalized, we think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion.

Ibid.

Dayton establishes that, even when a remedy is not supported by existing findings, a court has discretion to leave the remedy in place pending the outcome of further proceedings aimed at determining what remedy is appropriate. The principal distinction between the present case and *Dayton* is that there are ongoing settlement discussions here. If anything, however, that factor provides even greater justification for leaving an existing remedy in place. See *Williams* v. *First Nat'l Bank*, 216 U.S. 582, 595 (1910) (the law favors settlement of civil litigation).

That is particularly true on the facts of this case. The district court has entrusted the settlement process to a distinguished settlement coordinator and has equipped that coordinator with ample power to assist the parties in reaching a settlement. Pet. App. 11a. The court below also made clear that, if the

settlement discussions should reach an impasse, the district court must promptly resolve petitioner's pending motion for unitary status. *Id.* at 16a. In those circumstances, the district court acted well within its discretion in denying petitioner's motion to prevent new entrants into the VITP for the 1997-1998 school year.

3. Review is also unwarranted in this case because petitioner's request for relief is now moot. Petitioner's motion requested only that the district court suspend the entry of new students into the VITP for the 1997-1998 school year; the motion did not request relief for any other school year. C.A. App. 114 ("The Court should enter an order, pursuant to Fed. R. Civ. P. 60, modifying its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year, that all parties to this action and all advisory panels be prohibited from taking any steps to recruit and enroll new students into the VIDT program for the upcoming school year, and clarifying that the State has no financial obligation as to such students."). Petitioner deliberately framed its motion in that way, because it wished to continue to participate in settlement discussions concerning all other aspects of the VITP. *Id.* at 109 n.3. The district court denied petitioner's motion in the terms in which it was presented, Pet. App. 23a, and the court of appeals' affirmance was similarly limited, *id.* at 21a. The court of appeals specifically stated that "[w]e affirm the order of the district court denying the State's motion to end all efforts to recruit and admit new students into the VITP for the 1997-98 school year." *Ibid.*

Events have now overtaken petitioner's request to prevent the admission of new students into the VITP

for the 1997-1998 school year. All students seeking entry into the VITP program for the 1997-1998 school year have now been admitted, the school year is more than half over, and petitioner does not suggest that it would seek to remove the new entrants from the program at this late date—let alone at the time when a decision by this Court would ordinarily be anticipated. Petitioner's motion to prevent the admission of new students into the VITP for the 1997-1998 school year is therefore moot. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-320 (1974) (per curiam) (challenge to race-based admission program held moot where student challenging the program had registered for his final semester and the university represented that it would not seek to abrogate that registration).

Nor does this case fall within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). While the issue petitioner seeks to raise is capable of repetition, it would not necessarily evade review in the future. For example, petitioner could obtain review in the future by seeking to preclude any new entrants into the VITP, not just entrants for a particular year. As a matter of litigation strategy, however, petitioner chose to limit its request to a single school year. The consequence of that strategy is that petitioner's request for relief is moot. See *Brockington* v. *Rhodes*, 396 U.S. 41, 43-44 (1969) (per curiam) (mootness found based on the limited relief sought).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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